77-1729

No. ———

IN THE

Supreme Court of the United States

October Term, 1977

UNITED STATES OF AMERICA,
Petitioner,

v.

HELEN D. KELLEY and JOHN E. KELLEY,
Respondents.

Response to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Question Presented.

Given the following facts:

(1) The fact that the plaintiffs were injured by the negligent operation of a private car whose owner-operator happened to be a Government employee;

(2) The fact that the injured plaintiffs were unaware of the employment of the negligent owner-operator and of the nature and scope of his work, and consequently commenced and pursued their case against him in State Court;

(3) The fact that the Federal Government was promptly notified of the occurrence; investigated the accident; and discussed the matter with the private insurance carrier of the negligent owner-operator;

(4) The fact that the Government employee admittedly failed to comply with the legal requirement to give prompt notice of suit to the Government;

(5) The fact that the Government employee's private insurance company, with full knowledge of the facts, nevertheless defended the State Court case to the point where it was ready for trial (1 and 1/2 years) without pleading the Government's involvement as a defense (something clearly required by State Law), until just after the two years for filing an administrative claim ran;

(6) The fact that the Office of Research and Operations Division of the Office of the General Counsel in Washington, D. C., through a Mr. Merwin Kaye, requested the negligent Government employee to request the intervention of the United States Government, more than two years after the accident, while denying knowledge of the action in the State Court until receipt of Mr. Sommer's letter of December 9, 1974; (J.A. 19, 65-68)

(7) The fact that because of the failure of the Government employee and his insurance carrier to give the required notice of suit to the Government and the failure of care on the part of the Government agency itself, the Government did not move promptly as required by Law to certify that its employee was in the course of his employment and to intervene;

(8) The other facts found in the proceedings at the District Court level:

are the injured plaintiffs entitled to just relief as the Courts below have held although an administrative claim was not filed within two years after the occurrence of the accident?

Statement.

On November 8, 1972, respondent, Helen Kelley, was injured when she was struck by a car owned and driven by Francis Hunt, bearing no indication relating to the employment of Francis Hunt. In March of 1973, respondent, Helen Kelley and her husband, John E. Kelley, commenced an action in the Supreme Court of the State of New York against Francis Hunt, individually, and Ruth Semko, the driver of another vehicle claimed to have been involved in the accident.

Francis Hunt was insured against liability by the Travelers Insurance Company. He reported the accident to his insurance company and to the Federal Government, and both investigated the accident. When he was subsequently sued, he reported the institution of the action to his insurance company, The Travelers Insurance Company, but claims that he did not notify his superiors in the Federal Government, even though the action against him was for an amount of $140,000.00 in excess of his insurance coverage. The Travelers Insurance Company, however, was aware of the involvement of the Federal Government and in fact, through its employee a Mr. Koons, conferred with an employee of the Federal Government engaged in the investigation of the accident and was fully informed regarding the nature and extent of the employment of Francis Hunt (J.A. 22, 32).

The Travelers Insurance Company undertook the defense of Francis Hunt in the State Court with full knowledge of Francis Hunt's employment. They did not, by answer or pleading in the State Court, raise the defense that the claim was one against the United States Government or the defense required under the rules of Civil Practice of the State of New York of lack of jurisdiction over the person of Francis Hunt or the cause of action involved. The petitioner now claims to benefit from the failure of the Travelers Insurance Company to properly plead the defense available to Francis Hunt, even though the payment to be made by the petitioner to the plaintiffs will be reduced by the amount of Francis Hunt's insurance policy. *United States v. Government Employees Insurance Co.,* E. D. Va. 1976, 409 Supp. 986 (J.A. 18a).

In December of 1974, approximately one month more than two years after the accident, a Mr. Merwin Kaye, employed by the Federal Government in the Research and Operations Division of the Office of the General Counsel in Washington, D. C., called Francis Hunt and asked him to send a telegram to the Government, asking the U. S. Government to defend him pursuant to 28 U. S. Code §2679. Such a telegram was sent on December 9, 1974, and letters requesting the same action by the Government were mailed on December 10, 1974 by Theodore Sommer, the attorney actually representing Francis Hunt in the State Court action (J.A. 65-69). The petitioner has never disclosed the identity of Merwin Kaye or denied his participation in the matter as disclosed by the letter of Theodore Sommer.

The United States Government is the beneficiary of the insurance policy carried by Francis Hunt in the Travelers Insurance Company which must indemnify the United States to the limit of the insurance coverage against this claim. *United States v. Government Employees Insurance Co.,* E. D. Va. 1976, 409 Supp. 986 (J.A. 18A).

When the call from Mr. Merwin Kaye was made and the attorneys for Francis Hunt and the Travelers Insurance Company requested Government intervention, the action was about to be tried in the Supreme Court of the State of New York (J.A. 35-36).

Reasons for Denial of the Petition.

The petitioner asserts that jurisdiction of the Supreme Court should be invoked because of conflict between the decision in the present case and other Circuit Court decisions, particularly, *Meeker v. United States,* 8th Cir. 1970, 435 F. 2d 1219. If one considers the language of the opinion in the *Meeker* case, and the Court's opinion in the present case, a conflict may appear to exist. However, the factual situations with respect to the institution of proceedings against the Government employee are so different as to make the conflict much more apparent than real.

In the present case, the action in the State Court was commenced against the Government employee approximately eight months after the accident causing injury occurred. Government procedures provided for the notification of the appropriate Government agencies and the United States Attorney for the Northern District of New York of the fact of the commencement of the action which, if complied with, would have advised the respondents, Helen Kelley and John Kelley, of the Government's potential responsibility so that an appropriate administrative claim would have been filed long before the expiration of two years from the occurrence of the accident.

In *Meeker,* on the other hand, the accident involved an identified United States vehicle, a postal truck, alerting the injured person to the interest of the United States Government at once. Yet, the first action taken was action directly

against the employee one day prior to the expiration of the two-year statute of limitations set forth in U.S.C. 2401 and U.S.C. 2675 for the filing of claims and the commencement of action. Consequently, there was no time within the statutory period within which the United States could act to protect its interest in the matter. In *Meeker,* the action was started against the employee so late that compliance by the employee with the procedures for alerting the responsible persons in Federal Government within the two-year limitation to the commencement of the action was impossible. There was no opportunity whatever for the United States Government to be made aware of the commencement of the action, or the filing of the claim, if the commencement of the action is to be regarded as the filing of a claim. Consequently, it was not unreasonable to consider the two-year limitation as a bar in that case. The present case presents a completely different picture involving, as it does, the failure of the Federal Government, through its employees and agencies, to act within a reasonable time upon an action commenced against one of its employees.

The petitioner argues that 70 or approximately 17% of the 415 tort suits against the United States in fiscal 1977 arising from the operation of motor vehicles by Federal Government employees were commenced against individual drivers. (Petition, pp. 7 and 8). There is, however, no indication that the suits so instituted did not involve the filing of administrative claims and the opportunity for administrative review and action before the disposition of such claims. Consequently, the argument advanced is totally unsupported. The cases cited in the petition, the opinion of the Circuit Court of Appeals, indicate very prompt action by the Government in moving to be substituted in such cases. They also support the conclusion that the administration of the Tort Claims Act

as envisioned by the Circuit Court decision in this case will result in a just determination of such claims with no appreciable interference with the administrative process.

Since approximately 17% of the claims made under the Tort Claims Act resulting from the operation of motor vehicles by Federal Government employees are commenced, usually in State Court, against such employees, it becomes obvious that there are a substantial number of such claims in which the relation between the employee and the Government is not known to the injured party. In each of such claims the petitioner's argument will lead to the denial of relief. This would be due, in most cases, to the concealment of a known defense by a liability insurance company until the two-year statute had run, leaving the injured claimant with no remedy. It is inconceivable that the Congress intended such a result. The interpretation sought by the Government would do nothing to aid the appropriate functioning of the administrative process while creating a jungle of uncertain and unjust litigation.

On pages 12 and 13 of the petition at Note No. 8, the petitioner refers to proposed legislation pending before the House and Senate Judiciary Committee (H.R. 9219, S. 2117, 95th Cong. 1st Sess., 1977) which would provide specifically that after substitution of the United States as a defendant in a suit originally brought against an employee, "The United States shall have available all defenses to which it would have been entitled if the action had originally been commenced against the United States under this chapter (i. e., Chapter 171) and Section (1346b)."

The proposed legislation clearly indicates the recognition by the Congress that the existing statutes do not provide the United States with all defenses which might have been available had the action originally been commenced

against the United States, rather than against the employee. It supports the interpretation of legislative history adopted by the Second Circuit Court of Appeals in this case. It should be sufficient to put at rest permanently any earlier interpretations of the statutory language which might be considered contrary to the action of the Second Circuit in the present case.

The decision of the Court of Appeals in this case is a comprehensive review of the facts, the applicable statutes and the legislative history of the statute. It is clearly consistent with the expressed intent of the legislature to waive immunity in the type of cases here involved and to substitute the liability of the United States for the liability of any employee operating a motor vehicle in the course of his employment for the United States. It recognizes that a waiver of immunity is precisely that, and further recognizes that its effect should not be destroyed by a judicial interpretation which is inconsistent with the purposes of the act and with its reasonable application. The denial of certiorari in this case will place the burden of clarifying any uncertainties created by the statute squarely on the legislative body where it belongs and will bring a just result through the immediate termination of this simple and grossly over-litigated claim.

CONCLUSION.

The petition for certiorari should be denied.

Respectfully submitted,

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